Filed 12/11/03 Dez Construction v. Calexico Unif. School. Dist. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DEZ CONSTRUCTION, Plaintiff and Appellant, v. CALEXICO UNIFIED SCHOOL DISTRICT, Defendant and Respondent;	D040819 (Super. Ct. No. M0092)
DOUGLAS L. DENTON, Real Party in Interest and Respondent.	

APPEAL from a judgment of the Superior Court of Imperial County, James H. Harmon, Judge. Reversed and remanded with directions.

Dez Construction (Dez) appeals a judgment denying its petition for peremptory writ of mandamus that challenges the award of a public construction contract by Calexico

Unified School District (District) to Douglas L. Denton, doing business as J.D. Glass & Construction (Denton). Dez contends that because Denton was not a responsive bidder under the contract bid documents, the trial court erred by concluding District did not act arbitrarily or capriciously in awarding the contract to Denton. Dez further contends that although the construction project has been completed by Denton, this appeal is not moot and Dez should be awarded its bid preparation costs and Code of Civil Procedure section 1021.5 attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

On April 26, 2002, District issued a notice inviting bids (Notice) for installation of new water and gas lines at DeAnza Junior High School in Calexico. The Notice stated the requirement that bidders hold a valid Type B (general building) contractor's license. A Bid Form was attached to the Notice for completion and submission by bidders. Under the "DESIGNATION OF SUBCONTRACTORS" section, the Bid Form provided:

> "A. In accordance with Sections 4100 and 4113, Public Contract Code, the undersigned hereby sets forth below the name and address of each and every subcontractor who will perform work or labor or render service to the Contractor in relation to the work or improvements to be performed under this contract in an amount in excess of one-half of one percent of the total bid.
>
> "B. *If the undersigned fails to specify a subcontractor for any portion of the work to be performed under the Contract, it is hereby agreed the General Contractor is Fully Qualified* and shall perform that portion of work himself and that he shall not be allowed to subcontract that part of work except as expressly provided for hereinafter. *Fully Qualified means holding the specialty license required for that trade*.
>
> "C. Subletting or subcontracting of any portion of the work to which no subcontractor was designated in the original Bid Form shall only

> be permitted in case of public emergency or necessity and then only after specific written agreement by District." (Italics added.)

Denton submitted a bid of $679,711 and did not list any subcontractors for any portion of the work. Dez submitted a bid of $689,000 and listed subcontractors for demolition, concrete, plumbing, paint, and locator work.[1] On May 28 District awarded the contract to Denton.

On May 29 Kenton Hems, the project architect who drafted the Notice and Bid Form on behalf of District, sent a letter to District informing it that Denton's bid did not conform to the bid documents because the bid did not list any subcontractors and noting the Bid Form defined "fully qualified" as holding a specialty license in the specific trade.

On May 30 Dez sent a letter to District protesting its award of the contract to Denton. Dez's letter noted that Denton held only Type B and Type C-17 licenses, and not the specialty licenses for the required work; and that Denton did not list any subcontractors in his bid and represented he was "fully qualified" to perform that specialty work. On June 8 District rejected Dez's protest.

Dez filed a petition for peremptory writ of mandamus under Code of Civil Procedure section 1085 challenging District's award of the contract to Denton. Dez argued Denton was not a responsive bidder because he did not list any subcontractors and did not possess a specialty contractor's license for required plumbing work. The petition

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1 A third bidder, Oakview Construction, submitted a bid of $358,000, but District rejected that bid after determining it did not include removal of the existing water and gas lines, which was required under the scope of work.

requested a peremptory writ of mandamus directing District to void its award of the contract to Denton and to award the contract to Dez. It also sought temporary injunctive relief staying the bid proceedings and construction of the project.

The trial court denied Dez's request for temporary injunctive relief and ordered Hems to answer four interrogatories and produce certain documents. Hems answered the interrogatories, admitting that on behalf of District he prepared the Notice and Bid Form and answering "yes" to the question: "[D]id you intend for paragraph B at page 2 of the bid form to require a properly licensed general building contractor, who did not list a subcontractor in his bid for a portion of the work (and who thereby agrees to perform the particular work himself), to also possess a specialty contractor's license for the subject work?" Hems denied that he communicated his intention to either District's governing board or to prospective bidders "by any means other than through the language contained in paragraph B of the bid form."

District opposed the petition, arguing that paragraph B of the Bid Form did not require bidders to possess any specialty contractor's licenses and, in any event, it had discretion to waive any irregularity in Denton's bid. District submitted two declarations of Scott Buxbaum, its assistant superintendent of business services, in which Buxbaum stated that (1) HMC Architects (Hems's company) prepared the bid documents as District's consultant, and (2) he did not receive any communication from anyone that it was District's intent to have a general contractor specifically list subcontractors in the Bid Form.

After a hearing, the trial court issued a statement of decision addressing the question "whether Denton needed to have a C-36 plumbing specialty contractor's license, in addition to his general building contractor's license, by reason of the . . . language in Paragraph B [of the Bid Form]." It concluded the Notice and Bid Form were ambiguous on that question, stating: "To the extent paragraph B requires a licensed building contractor to also possess a specialty contractor's license, it imposes a licensing condition greater than required by state law. Although it appears the District might have legally imposed such a licensing requirement, it is at odds with other licensing language in the [Notice]." (Fns. omitted.) Considering extrinsic evidence to resolve the ambiguity, the court noted Hems did not communicate to either District's governing board or to prospective bidders "his intention to impose the foregoing 'extra' licensing requirement[s] . . . except via the language contained in paragraph B [of the Bid Form]." The court stated:

> "In this case, the apparent general intent of the contract documents is to require that bidders be licensed as general building contractors and that any listed subcontractors possess applicable specialty contractor licenses. As shown, such intention is clearly expressed under contract captions [in the Notice] dealing with 'licensing.' Conversely the seemingly extraordinary requirement in paragraph B [of the Bid Form] is hidden among language incorporating requirements of Section 4106 of the Public Contract Code.
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> "Particular clauses of a contract are subordinate to its general intent, and words in a contract that are inconsistent with the main intention of the parties, are to be rejected. (14 Cal.Jur.3d, Contracts § 189.) Under such rule, Paragraph B should not be construed to preclude the award to Denton.
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> "The District would almost certainly face a (possibly meritorious) lawsuit by Denton, were it to have rejected his bid on the grounds

> urged by [Dez]. Considering all the circumstances, it cannot be said the [District's] Governing Board's award was arbitrary [or] capricious or that it failed to follow proper procedures as required by law." (Fn. omitted.)

Accordingly, the trial court denied the petition for peremptory writ of mandamus.

Dez timely filed a notice of appeal.[2]

DISCUSSION

I

Mootness

Dez contends its appeal is not moot because one or more of the exceptions to the general mootness doctrine applies.

A

"An appeal [generally] should be dismissed as moot when the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief. [Citation.]" (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479 (hereafter *Cucamongans*).) "This rule has been regularly employed where injunctive relief is sought and, pending appeal, the act sought to be enjoined has been performed." (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 227.) In *Giles*, we noted:

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2 Although the record does not contain a document titled "judgment," we consider the trial court's statement of decision to be an appealable final judgment regardless of its label. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698; *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583 [order denying petition for writ of mandate is treated as final judgment]; *Townsel v. San Diego Metropolitan Transit Development Bd.* (1998) 65 Cal.App.4th 940, 944, fn. 1 [same].)

> "[I]n *Jennings v. Strathmore Public etc. Dist.* (1951) 102 Cal.App.2d 548 [227 P.2d 838], the plaintiff sought to enjoin and declare invalid a public utility district contract after the contract had been let and work was well under way. After the trial court dismissed the action as moot (and based upon the plaintiff's lack of standing), the plaintiff appealed. By the time the appeal was heard, the work was fully completed. The Court of Appeal again dismissed the case as moot. [Citation.]" (*Giles*, *supra*, at p. 227.)

"Notwithstanding [the general mootness doctrine], there are three discretionary exceptions to the rules regarding [dismissal for] mootness: (1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court's determination [citation.]" (*Cucamongans*, *supra*, 82 Cal.App.4th at pp. 479-480.)

B

Dez concedes it cannot be granted effective relief on appeal because the project has been completed by Denton. The relief sought by the petition included a peremptory writ of mandamus directing District to void its award of the contract to Denton and to award the contract to Dez, and temporary injunctive relief staying the bid proceedings and construction of the project. Because Denton was awarded the contract and fully executed it by completing all construction work on the project, Dez cannot be granted any effective relief. (*Giles v. Horn*, *supra*, 100 Cal.App.4th at p. 227; *Jennings v. Strathmore Public etc. Dist.*, *supra*, 102 Cal.App.2d at p. 549.) Therefore, as District asserts, the general mootness doctrine ordinarily would apply.

However, because, as Dez asserts, the controversy in this appeal may recur between the parties, we exercise our discretion to consider Dez's appeal regardless of the unavailability of effective relief. (*Cucamongans, supra*, 82 Cal.App.4th at pp. 479-480.) It is possible that District will invite bids for future construction projects involving specialty contractor work and that District's architect or other representative will include in bid documents language the same as or similar to that contained in paragraph B of the Bid Form in this case. It is also possible that Dez and other general building contractors will submit bids naming subcontractors for the required specialty work, but Denton and other general building contractors may submit bids without naming subcontractors for that specialty work and without holding specialty contractor's licenses. Therefore, we believe our consideration of this appeal may help avoid a recurrence of the parties' instant disagreement regarding the language contained in the Notice and Bid Form.[3] (*Id*. at p. 480.)

II

Interpretation of Bid Documents

Dez contends the trial court erred by concluding the Notice and Bid Form were ambiguous regarding whether they required a general building contractor to hold a specialty contractor's license if that contractor did not list in the Bid Form a subcontractor

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3 Although we need not rely on any other exception to the mootness doctrine, it is also possible Dez's appeal involves a matter of broad public interest that is likely to recur. (*Cucamongans*, *supra*, 82 Cal.App.4th at pp. 479-480; *M & B Construction v. Yuba County Water Agency* (1999) 68 Cal.App.4th 1353, 1358.)

to perform substantial specialty work. He further contends that, even if the Notice and Bid Form were ambiguous, the parol evidence did not support the trial court's finding that Denton, as a "non-listing" general building contractor, was not required to hold a specialty contractor's license for specialty work he performed himself.

A

"It is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence." (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439.) In *Winet v. Price* (1992) 4 Cal.App.4th 1159, we stated:

> "[W]hen no parol evidence is introduced (requiring construction of the instrument solely based on its own language) or when the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the appellate court will independently construe the writing. [Citation.]" (*Id*. at p. 1166.)

In such cases, "we will independently draw inferences and interpret the [contract]." (*City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 71.)

"Our objective in construction of the language used in the contract is to determine and effectuate the intention of the parties. [Citation.] It is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce. [Citation.]" (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1166.) In *Crow v. P.E.G. Construction Co., Inc.* (1957) 156 Cal.App.2d 271, the court noted:

> " '[T]he law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to

> his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on [the] subject.' " (*Id*. at pp. 278-279.)

"As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit. [Citations.] A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach' [citation]. *If possible, the court should give effect to every provision*. [Citations.] *An interpretation [that] renders part of the instrument to be surplusage should be avoided*. [Citations.]" (*Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730, italics added.) Civil Code section 1641 provides: "The whole of a contract is to be taken together, so as to *give effect to every part*, if reasonably practicable, each clause helping to interpret the other." (Italics added.) "Courts must interpret contractual language in a manner [that] gives force and effect to *every* provision, and not in a way [that] renders some clauses nugatory, inoperative or meaningless. [Citations.]" (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473; see also *New York Life Ins. Co. v. Hollender* (1951) 38 Cal.2d 73, 81-82 [rejecting insured's interpretation of an incontestability clause because it would effectively nullify other clauses unambiguously permitting age adjustment].) "[T]he specific provisions in an agreement prevail over those that are general, if inconsistent with the general provisions . . . ." (*Jackson v. Donovan* (1963) 215 Cal.App.2d 685, 691; see also *McNeely v. Claremont Management Co.* (1962) 210 Cal.App.2d 749, 753 ["[W]here a general and a particular provision of a written instrument are inconsistent, the particular

controls the general."].) Code of Civil Procedure section 1858 provides: "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to . . . omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

"[P]arol evidence is properly admitted to construe a written instrument when its language is ambiguous. The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.' [Citation.] [¶] The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the contract. [Citation.]" (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1165.)

"The trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact. [Citation.] Thus the threshold determination of ambiguity is subject to independent review. [Citation.]" (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1165.) When a contract is determined to be ambiguous

and parol evidence is properly admitted to aid in construing the contract, we independently review the trial court's construction if the parol evidence does not conflict and apply the substantial evidence standard of review if that evidence conflicts and requires resolution of credibility issues. (*Id*. at pp. 1165-1166.)

B

Dez asserts the trial court erred by concluding, as a matter of law, that the Notice and Bid Form were ambiguous regarding whether they required bidders to hold a specialty contractor's license for specialty work if they did not list any subcontractors for that work. Considering the parol evidence provisionally received by the trial court on that issue, we conclude the Notice and Bid Form are not reasonably susceptible to more than one meaning and therefore are *not*, as a matter of law, ambiguous. (*Winet v. Price*, *supra*, 4 Cal.App.4th at pp. 1165-1166.) The record contains the Notice, the Bid Form, Hems's interrogatory responses, Hems's letter to District, and Buxbaum's declarations. Hems's letter supports an inference that the Bid Form was intended to require "non-listing" general building contractors to have a specialty contractor's license for specialty work they will perform themselves. Hems's interrogatory responses state he did not communicate his intent to District's governing board or prospective bidders other than through the language of paragraph B of the Bid Form. Although the only communication to District and prospective bidders regarding Hems's intent was through the language of the Notice and Bid Form, neither his letter nor his interrogatory responses show District or Denton had a different understanding of Paragraph B. Similarly, although Buxbaum's declaration states that he did not receive any communication from anyone that it was

District's intent to have a general contractor specifically list subcontractors in the Bid Form, it did not state he or anyone else at District had a different understanding from Hems or the plain meaning of the language of the Bid Form.[4] Therefore, the undisputed parol evidence provisionally received by the trial court does *not* support a reasonable inference that the Notice and Bid Form are reasonably susceptible to a construction that general building contractors are not required to have a specialty contractor's license if they do not list subcontractors for specialty work and will therefore perform that work themselves. Under the *Winet* standard, the trial court erred by admitting the parol evidence in construing the Notice and Bid Form. (*Ibid*.)

Because the parol evidence is irrelevant, we independently determine, as a matter of law, whether the Notice and Bid Form are reasonably susceptible to more than one meaning. In so doing, we look solely to the language of those documents. The Notice required all bidders to hold Type B general building contractor's licenses.[5] The Bid Form was incorporated into the Notice by reference and attached. On page two of the

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4 Although District also submitted a declaration of Denton, that declaration did not discuss his understanding of or any communications regarding the Notice or the Bid Form.

5 The Notice stated: "LICENSE REQUIREMENTS: Bidders are required pursuant to California Business and Professions Code [section] 7028.15 to hold a valid State Contractor's License, Type B, as classified in Public Contract Code Section 3300 prior to execution of the Agreement. Bidders shall conform to California Business and Professions Code [section] 7059 for Specialty Contractor's Licensing Provisions. Certification is contained in the Bid Form."

three-page Bid Form, it stated in the "DESIGNATION OF SUBCONTRACTORS" section:

> "A. In accordance with Sections 4100 and 4113, Public Contract Code, the undersigned hereby sets forth below the name and address of each and every subcontractor who will perform work or labor or render service to the Contractor in relation to the work or improvements to be performed under this contract in an amount in excess of one-half of one percent of the total bid.
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> "B. *If the undersigned fails to specify a subcontractor for any portion of the work to be performed under the Contract, it is hereby agreed the General Contractor is Fully Qualified* and shall perform that portion of work himself and that he shall not be allowed to subcontract that part of work except as expressly provided for hereinafter. *Fully Qualified means holding the specialty license required for that trade*." (Italics added.)

The meaning of the language in the Notice and Bid Form is plain. Furthermore, the language of paragraph B of the Bid Form's section on designation of subcontractors (Paragraph B) is *not* inconsistent with the Notice's general licensing requirement language. Paragraph B plainly provides for specific licensing requirements for certain bidders in addition to the Notice's general licensing requirements for all bidders. Under the Notice's general licensing provisions, all bidders must have a general building contractor's license. Paragraph B is a specific provision that applies only to those bidders who do not list any subcontractors for substantial (more than one-half of one percent of the total bid) specialty work and therefore represent that they will perform that work themselves. (Pub. Contract Code, §§ 4104, 4106.) Although that additional licensing requirement may not be necessary under state licensing laws, there is nothing that precludes District by contract from requiring bidders to meet licensing requirements that

exceed the minimum statutory requirements. (*M & B Construction v. Yuba County Water Agency*, *supra*, 68 Cal.App.4th at pp. 1361-1362.) Specific contract provisions are to be given effect and control over general contract provisions, even if they are inconsistent. (*Jackson v. Donovan*, *supra*, 215 Cal.App.2d at p. 691; *McNeely v. Claremont Management Co.*, *supra*, 210 Cal.App.2d at p. 753 ["[W]here a general and a particular provision of a written instrument are inconsistent, the particular controls the general."]; Code Civ. Proc., § 1858.)

Furthermore, in construing the Notice and Bid Form, we must give effect to every provision, including Paragraph B, if possible. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 68 Cal.App.4th at p. 473; *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.*, *supra*, 177 Cal.App.3d at p. 730; *New York Life Ins. Co. v. Hollender*, *supra*, 38 Cal.2d at pp. 81-82; Civ. Code, § 1641.) "Courts must interpret contractual language in a manner [that] gives force and effect to *every* provision, and not in a way [that] renders some clauses nugatory, inoperative or meaningless. [Citations.]" (*City of Atascadero*, *supra*, at p. 473.) The effect of the trial court's construction is to omit Paragraph B from the Bid Form and render it "nugatory, inoperative or meaningless." (*Ibid*.) In so doing, it improperly applied the rules for construction of contracts. Furthermore, it erred by concluding the "general intent" of the Notice and Bid Form required bidders to have only general building contractor's licenses.[6] Rather, the

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6 We also disagree with the trial court's characterization of Paragraph B as "hidden." Rather, Paragraph B is included in the short three-page Bid Form that all bidders must read and complete in submitting their bids. Its type size is the same as all other

general intent of those documents is evidenced by considering all licensing provisions together.

Although all bidders were required to have general building contractor's licenses, only those who would perform specialty work themselves were required to have specialty contractor's licenses for that work. The apparent reasoning for that additional specialty license is that it increased the likelihood that specialty work performed directly by the bidder would be completed in accordance with bid and industry standards. Therefore, Hems, on behalf of District, had a specific purpose for including Paragraph B in the bid documents and that paragraph should not be ignored as mere surplusage. Because the Notice and Bid Form were not ambiguous and there is only one meaning to which their language is reasonably susceptible (i.e., that a "non-listing" bidder is required to have a specialty contractor's license for specialty work directly performed), the trial court erred by concluding Paragraph B did not require Denton to have a specialty plumbing contractor's license for his direct performance of plumbing work on the project. Because Denton did not list any subcontractors and did not have the required specialty plumbing contractor's license, District acted arbitrarily and capriciously by awarding the contract to Denton, who submitted a nonresponsive bid. (*Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303.)

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provisions in the Bid Form. It cannot reasonably be concluded that Paragraph B was so obscure or hidden among other provisions that a reasonable bidder would not have been aware of it.

C

District argues it had discretion to waive the defect or irregularity in Denton's bid. (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 903-909; *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1181 [waiver allowed for missing signature on bid form if bidder's signature appears elsewhere].) District cites the following sentence in the Notice: "The District, however, reserves the right to reject any or all bids and to waive any irregularities and informalities in any bid or in the bidding for any reason." " 'A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted. [Citations.] However, it is further well established that a bid [that] substantially conforms to a call for bids may, though it is not strictly responsive, be accepted *if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders* or, in other words, if the variance is inconsequential. [Citations.]' " (*Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 454, quoting 47 Ops.Cal.Atty. Gen. 129, 130-131 (1966).) However, in this case if Denton were not required to comply with Paragraph B, he could have a competitive advantage over other bidders. (*Konica,* at p. 454; *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1443.) As Dez notes, if Denton were allowed to perform specialty work directly without using specialty subcontractors, he could achieve cost savings that would allow him to bid a lower price than bidders who comply with Paragraph B. District does not show that a waiver of compliance with Paragraph B could not have affected the amount of Denton's bid or given him an

advantage not allowed other bidders. (*Konica*, at p. 454.) Paragraph B was not an immaterial provision in the bid documents that could be the subject of waiver by District. (*Valley Crest*, at p. 1443.) Because Denton's bid was nonresponsive and District could not waive the defect in Denton's bid, District's contract with Denton is invalid.

III

Bid Costs and Attorney Fees

Dez contends it is entitled to awards of its bid preparation costs and Code of Civil Procedure section 1021.5 attorney fees.

A

Dez asserts that because its petition included a request for damages, it is entitled to an award for the costs of preparing its bid. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 308, 315-321 [bidder wrongfully denied contract may recover bid preparation costs, but not lost profits].) However, Dez's petition for peremptory writ of mandamus requested only injunctive relief and costs. It did not request an award of damages. Therefore, *Kajima* is inapposite and Dez cannot be awarded its bid preparation costs as damages.

Dez appears to alternatively argue that it is entitled to an award of its bid preparation costs as an element of costs. Although Dez's petition requests an award of its costs, the cost or expense of preparing a bid is *not* a type of statutory "cost" that may be awarded under Code of Civil Procedure sections 1032 and 1033.5. Therefore, Dez's bid preparation costs are not recoverable as statutory costs.

B

Dez requests that we award it attorney fees under Code of Civil Procedure section 1021.5, which provides:

> "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action [that] has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. . . ."

Although an appellate court has the discretion to make an initial determination whether an appellant is entitled to an award of attorney fees under Code of Civil Procedure section 1021.5, "in many, perhaps most, cases . . . the trial court will be better equipped to decide whether fees should be awarded under [that statute]." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 426.) "It is therefore proper for a reviewing court to defer to the trial court in making that determination. [Citations.]" (*Ibid*.)

We decline to exercise our discretion to initially determine whether Dez is entitled to an award of attorney fees under Code of Civil Procedure section 1021.5. Rather, on remand the trial court should accept and consider additional briefing and argument on this issue and make the initial determinations whether Dez should be awarded those fees, and, if so, the appropriate amount of that fee award.

DISPOSITION

The judgment is reversed and the matter is remanded with directions that if Dez files a motion for attorney fees under Code of Civil Procedure section 1021.5 within 30 days after the issuance of the remittitur, the superior court shall decide whether Dez is entitled to an award of attorney fees under Code of Civil Procedure section 1021.5 and, if so, award an appropriate amount to it. Dez shall recover its costs on appeal.

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McDONALD, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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IRION, J.